

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

UNITED STATES OF AMERICA

v.

GWENDOLYN BERRY

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CRIMINAL ACTION H-17-385

MEMORANDUM OPINION AND ORDER

Pending before the court is the government’s motion for final order of garnishment as to Gwendolyn Berry (Dkts. 138, 140) and Michael and Gwendolyn Berry’s objections to the proposed final order of garnishment (Dkt. 141). Having considered the motion, objection, reply, and applicable law, the court is of the opinion that the Berrys’ objections should be **OVERRULED** and the government’s motion for final order of garnishment should be **GRANTED**.

The Berrys re-urge all objections argued in response to the government’s first application for writ of garnishment and specifically object to the portion of the order of garnishment that provides that the garnishee “shall not withhold federal taxes” from Mrs. Berry’s one-half interest in the liquidated accounts. Dkt. 141 at 2. The Berrys rely on an Internal Revenue Manual that provides that “[t]he levy funds are subject to a 20 percent federal income tax withholding by the payor of such funds” in accordance with 26 U.S.C. § 3405(c). Dkts. 141 at 2, 141-1.

To the extent the Berrys re-urge previous objections considered by the court, those objections are **OVERRULED**. Further, the court finds 26 U.S.C. 3405(c) does not apply to Mrs. Berry’s one-half interest in Mr. Berry’s retirement accounts. The directive to withhold 20 percent of any distribution only applies to “any designated distribution which is an eligible rollover distribution.” The lump sum payment that would come from Mr. Berry’s retirement accounts is not an eligible rollover distribution. *See* 26 U.S.C. § 3405(c)(1)(B); *see also* 26 C.F.R. § 1.402(c)(2), Q-3 (May 12, 2014). The court is persuaded by the government’s interpretation that this is a non-periodic distribution that is only subject to a 10 percent withholding that may be waived by the payee. *See*

26 U.S.C. § 3405(b). Because the United States is the payee and is waiving the tax withholding, the retirement accounts are not subject to any federal income tax withholding. Accordingly, the Berrys' objections to the final order of garnishment are **OVERRULED**. The government's motion for final order of garnishment as to Gwendolyn Berry is **GRANTED**.

Signed at Houston, Texas on January 17, 2019.

A handwritten signature in black ink, appearing to read 'Gray H. Miller', is written over a horizontal line.

Gray H. Miller
Senior United States District Judge